

CALIFORNIA COASTAL COMMISSION

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**TH 16a**

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Commission Action:

STAFF REPORT: Request for Reconsideration**APPLICATION NUMBER:** A5-PPL-99-225R**APPLICANT:** Mount Holyoke Homes, Ltd. et. al**AGENT:** John M. Bowman**PROJECT LOCATION:** 425 Mount Holyoke Avenue, Pacific Palisades**PROJECT DESCRIPTION:** Subdivision of a vacant 41,880 sq. ft. parcel into three single-family residential lots consisting of 13,559, 13,939 and 14,385 square feet.**COMMISSION ACTION AND DATE:**

The Commission denied coastal development permit application no. A-5-PPL-99-225, on June 11, 2003.

SUMMARY OF STAFF RECOMMENDATION:

At the Commission's June 11, 2003 hearing, the Commission denied Mount Holyoke Homes' application for the subdivision of a vacant 41,880 sq. ft. parcel into three single-family residential lots consisting of 13,559, 13,939 and 14,385 square feet. The applicant asserts that there is new relevant evidence in terms of "alternatives" to preserve views from the property that could have been presented if they had access prior to the hearing to two letters submitted to the Commission the day before; and that there was an error of law in the Commission's decision to deny the proposed development in that the Commission neither set nor held a public hearing within 49 days of the filing of the appeal, as required by Public Resources Code Section 30621(a).

Commission Staff concludes that there is neither relevant new evidence nor any error of law that had the potential of altering the Commission's initial decision, and, therefore, staff recommends that the Commission reach the same conclusion and deny the reconsideration request.

PROCEDURAL NOTE:

The Commission's regulations provide that at any time within thirty (30) days following a final vote upon an application for a coastal development permit, the applicant of record may request that the Commission grant a reconsideration of the denial of an application, or of any term or condition of a coastal development permit which has been granted. Title 14 Cal. Code of Regulations Section 13109.2.

The regulations also state (*id.* at § 13109.4) that the grounds for reconsideration of a permit action shall be as provided in Coastal Act Section 30627, which states, *inter alia*:

The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the Commission's initial decision.

Cal. Pub. Res. Code § 30627(b)(3). Section 30627 (b)(4) of the Coastal Act also states that the Commission "shall have the discretion to grant or deny requests for reconsideration."

The applicant submitted a request for reconsideration of the Commission's June 11, 2002 decision on July 10, 2003, stating the grounds within the 30 day period following the final vote, as required by Section 13109.2 of the regulations. If a majority of the Commissioners present vote to grant reconsideration, the permit application will be scheduled for the upcoming hearing, at which the Commission will consider it as a new application. Title 14, Cal. Code of Regs., Section 13109.5(c).

Summary of Applicant's Contentions

The request for reconsideration is based on the assertions that there is relevant new information and that an "error(s) of law" have occurred that could potentially alter the Commission's initial decision (see Exhibit No.1). The applicant states in part:

1. The Commission apparently received letters from the office of Assembly member Fran Pavley and from Los Angeles City Council Member Cindy Miscikowski. The letter from Ms. Pavley expressed concerns about the need to protect views of the area from the Property and urged the Commission "to explore project alternatives that would allow the developer the reasonable use of his property but which could also preserve a view corridor for the public benefit". Similarly, the letter from Council Member Miscikowski stated that the "Coastal Commission should consider alternatives that would allow the applicant the right to subdivide subject to preserving an appropriate view corridor for the public benefit."

Had Mt. Holyoke's representatives known of Assemblymember Pavley's and City Council Member Miscikowski's requests that "alternatives" be explored to preserve

views from the Property (as opposed to views of the Property, which were thoroughly discussed in the commission's staff report dated May 21, 2003), Mt. Holyoke's representatives would have presented alternatives for the Commission's consideration...

2. Commission neither set nor held a public hearing within 49 days of the filing of the appeal, as required by Public Resources Code Section 30621(a), therefore, the Commission's decision to deny the CDP constitutes an error of law. Mt. Holyoke had neither actual nor constructive notice or knowledge of the appeal proceedings (July 1999 Commission hearing), and no hearing was actually held.
3. Furthermore, pursuant to Section 30622, the Commission must act upon an appeal within 21 days after the conclusion of the hearing required under Section 30621.

STAFF RECOMMENDATION:

MOTION: *I move that the Commission grant reconsideration of Coastal Development Permit No. A5-PPL-99-225*

STAFF RECOMMENDATION TO DENY RECONSIDERATION:

Staff recommends a **NO** vote on the motion. Failure to adopt the motion will result in denial of the request for reconsideration and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

RESOLUTION TO DENY RECONSIDERATION:

The Commission hereby denies the request for reconsideration of the Commission's decision on coastal development permit no. A5-PPL-99-225 on the grounds that there is no relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing, nor has an "error of fact" or "error of law" occurred which has the potential of altering the Commission's initial decision.

IV. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. Project Description and Location

On June 11, 2003, the Commission denied the proposed development that is subject to this reconsideration request. The proposed development was to subdivide a vacant 41,880 sq. ft. parcel into three lots consisting of 13,559, 13,939 and 14,385 square feet. The three proposed lots would have had street frontage of approximately 73, 78, and 80 feet, with a maximum depth ranging from 175 to 182 feet.

Topographically, the site consisted of a narrow near level pad, varying from approximately 5'-25' wide, adjacent to the street. The lot then descends westerly at approximately 35 degrees. The overall topographic relief is about 117 feet. Below the lot, a portion of the hillside continues to slope to Temescal Park with an overall relief of 175 feet below Mt. Holyoke Avenue.

The site is located on the western side of Mount Holyoke Avenue, along the eastern rim of Temescal Canyon, in the Pacific Palisades area, a planning subarea of the City of Los Angeles. The site is approximately 1,500 feet, or just over a quarter mile, inland of the intersection of Temescal Canyon Road and Pacific Coast Highway. The site is vacant and is vegetated with predominantly exotic vegetation with some native vegetation located in isolated areas.

Temescal Canyon is a narrow canyon with a four-lane road running along the bottom of the canyon from Pacific Coast Highway to Sunset Boulevard. A linear landscaped park is improved along the east and west side of the road.

The proposed project was for the subdivision of land only. A separate coastal development permit or permits would have been required for the future construction of single-family residences.

B. Grounds for Reconsideration

Pursuant to Section 30627 (b)(4) of the Coastal Act, the Commission has the discretion to grant or deny requests for reconsideration. Section 30627(a)(1) states that the Commission shall develop procedures that the Commission will use in deciding whether to grant reconsideration of any decision to deny an application for a coastal development permit, and shall follow those procedures in making that decision.

Section 30627 (b)(3) states in relevant part that the valid bases for a request for reconsideration include (1) "that an error of fact or law has occurred" that could alter the Commission's initial decision or (2) that there is "relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter". If the Commission votes to grant reconsideration, it will consider the permit application as a new application at a subsequent hearing.

C. Issues Raised by the Applicant

The applicant asserts (1) that there is new evidence that could alter the Commission's initial decision and (2) that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter:

Applicant's Assertion of new evidence

1. "The Commission apparently received letters from the office of Assembly member Fran Pavley and from Los Angeles City Council Member Cindy Miscikowski. The letter from Ms. Pavley expressed concerns about the need to protect views of the area from the Property and urged the Commission 'to explore project alternatives that would allow the developer the reasonable use of his property but which could also preserve a view corridor for the public benefit'. Similarly, the letter from Council Member Miscikowski stated that the 'Coastal Commission should consider alternatives that would allow the applicant the right to subdivide subject to preserving an appropriate view corridor for the public benefit'."

Staff Analysis

On June 10, 2003, a day before the scheduled hearing for the Mount Holyoke Homes project, the South Coast District office received faxed letters from Assembly member Fran Pavley and from Los Angeles City Council Member Cindy Miscikowski (see Exhibit No. 2 and 3). Copies of the two letters were handed out to the Commissioners and staff at the June 11, 2003 hearing.

The applicant's representative indicates the concern raised by the two letters was the potential impact the project would have on public views from the public street, Mount Holyoke, and the need to explore alternatives to the applicant's proposal to preserve views from the Property. During the hearing, and after the public testimony hearing was closed, Commissioner Wan made comments that raised some of the same issues that were raised, among other places, in the two letters, specifically issues regarding the impact of the proposal on public and neighborhood views. The applicant's representative argues that if these two letters were provided to them they could have presented alternatives for the Commission's consideration before the public comment period was closed.

Although the applicant's representatives may or may not have seen the letters prior to the hearing, the issue of neighborhood view impacts was addressed in the Commission staff report, during Commission staff's hearing presentation, and at the local level during the City's coastal development permit process. Furthermore, impacts on public views as seen from the public street and from Temescal Canyon and the beach, were discussed during meetings between Commission staff and the applicant and applicant's representatives. Moreover, during public testimony at the Commission hearing, one of the main issues raised by the opposition was the loss of public neighborhood views from Mount Holyoke and that there were other development alternatives available that would have less of an

impact on the neighborhood views. In fact, one of the speakers that spoke in opposition to the project during public testimony mentioned that the Commission received the two letters from Councilwoman Miscikowski and Assemblywoman Pavley, and stated that there were a number of alternatives that the Commission should consider, such as reducing the number of lots or increasing the size of the view corridor between lots. Therefore, the issue of alternatives raised in the two letters was not a new issue, and the applicant was fully aware of the general tenor raised in the two letters, despite purportedly not seeing the letters.

Since the applicant/representative was aware of this issue prior to the Commission decision, the applicant's representatives' had ample opportunity at the hearing during their public testimony and rebuttal period to respond to this issue and discuss alternatives.

Section 30627 (b)(3) of the Coastal Act states in relevant part that one valid basis for a request for reconsideration is that there is "relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter". This test is not met for several reasons. First, the applicant has not provided any specific alternative that it claims constitutes relevant new evidence and which was not presented at the hearing, and the general availability of alternatives was extensively discussed at the hearing. Second, even if there were alternatives that were not presented, or if the general availability of alternatives could have been addressed more thoroughly, the applicant has not provided any evidence that it could not have raised those issues at the hearing. The applicant was aware that both the impact on public views and the availability of alternatives were issues and could have provided, or discussed during the hearing, additional alternatives to the proposed project to address the view issue. Therefore, the submittal of the two letters at the hearing, and the applicant's representatives' alleged lack of awareness of the details of those letters, did not prevent the applicant or applicant's representatives from providing or discussing alternatives to the proposed project. In fact, one of the applicant's representatives addressed the alternatives issue as one of the two main points in his rebuttal. Therefore, there is no relevant new information that could not have been presented at the hearing which has the potential of altering the Commission's initial decision. Therefore, this claim does not supply a basis on which to grant the applicant's reconsideration request.

Applicant's Assertion of error of law

2. Commission neither set nor held a public hearing within 49 days of the filing of the appeal as required by Public Resources Code Section 30621(a), therefore, the Commission's decision to deny the CDP constitutes an error of law.

Staff Analysis

Section 30621(a) provides, in part, as follows:

(a) The commission shall provide for a de novo public hearing on applications for coastal development permits and any appeals brought pursuant to this division and shall give to any affected person a written public notice of the nature of the proceeding and of the time and place of the public hearing. Notice shall also be given to any person who requests, in writing, such notification. A hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission.

After a final local action on a Coastal Development Permit issued pursuant to section 30600(b) of the Coastal Act prior to certification of the LCP, the Coastal Commission must be noticed within five days of the decision. After receipt of a notice of final local government action a twenty working day appeal period begins. During the appeal period, any person, including the applicant, the Executive Director, or any two members of the Commission, may appeal the local decision to the Coastal Commission (Section 30602). Section 30621 of the Coastal Act states that a hearing on the appeal must be scheduled for hearing within 49 days of the receipt of a valid appeal (unless a waiver of the 49-days is received from the applicant, pursuant to Section 30625 of the Coastal Act). The appeal and local action are analyzed to determine if a substantial issue exists as to the conformity of the project to Chapter 3 of the Coastal Act (Section 30625(b)(1)). If the Commission finds substantial issue, the Commission continues the public hearing to act on the Coastal Development Permit application as a de novo matter.

On May 14, 1999, the South Coast District office received a notice of the City's approval of local coastal development permit no. 90-052 for the Mount Holyoke subdivision. On June 14, 1999, the South Coast District office received an appeal of the Local Coastal Development Permit during the twenty working day appeal period. On June 17, 1999, staff notified the City in writing that they forward all relevant documents and materials regarding the subject permit to the Commission's South Coast District Office in Long Beach and notified the appellant, applicant and applicant's representative. Although section 13112 of Title 14 of the California Code of Regulations requires local governments to deliver their local records for consideration of coastal development permit applications to the Commission within five working days of receipt of a Notice of Appeal, the local record in this case was not delivered until several months later. Accordingly, at the July 13, 1999 meeting, and within 49 days of receiving the appeal, the Commission opened and continued the public hearing pending receipt of the requested documents. The applicant submitted an uncertified copy of the record on December 6, 1999; however, since it was not certified by the City, the Commission could not be certain if the submitted record was the record the City based its decision on. Therefore, the applicant's uncertified copy of the record was not accepted by Commission staff. On March 30, 2000, the City certified requested record was received. On April 4, 2000, the applicant's representative submitted a stipulation by and between the City of Los Angeles, Mount Holyoke Homes, and the appellant (Barbara Schelbert) stating that the Commission has been provided all relevant documents used by the City in their local coastal permit decision. After receiving the certified documents, Commission staff scheduled the matter for a substantial issue hearing. At the May 9, 2000 Commission hearing, the Commission found the appeal to raise a substantial issue.

Following the Commission's finding of substantial issue, Commission staff requested additional information from the applicant's representative to supplement the City record and to address the issues raised in the substantial issue findings for the de novo portion of the hearing. After receiving and reviewing the additional information submitted by the applicant's representatives, the de novo portion of the hearing was scheduled for June 11, 2003, at which time the Commission subsequently denied the permit.

Based on the Commission's file record, the Commission held a hearing on the appeal within 49 days of receiving the appeal in accordance with Section 30621(a). The Commission opened the hearing within the 49 day limit and continued it until the City submitted its record to Commission staff. The City's certified record was not received until approximately 9 months after the request by Commission staff. The Commission could not hold a substantial issue hearing on the development until a certified copy of the record from the City was received and reviewed by Commission staff.

The applicant's representative argues that the California Court of Appeal in Encinitas Country Day School, Inc. v. California Coastal Commission, 108 Cal.App.4th 575, 578(2003), has recently ruled that the Commission's practice of merely "opening" the hearing within the 49-day period and "continuing" the matter beyond the 49-day period does not comply with Section 30621. However, in that case, the local government had submitted the relevant documents to the Commission one week after the Commission received the appeals, well before the 49-day deadline for Commission action had expired and four weeks before the Commission opened and continued the hearing on the matter. The court stressed these facts in noting that, at the meeting at which the Commission opened and continued the hearing on that matter:

"staff testified they had received only a portion of the file from the City. The record, however, shows that prior to the preparation of the report, the City had delivered to the Commission the bulk of the record. As of December 17, 1998, the City had delivered the last remaining files which consisted of a few minor documents All of the documents were delivered, as required, within five working days of the notice of appeals."

133 Cal.Rptr. 2d 551, 559.

The instant case presents a very different scenario. Here, the Commission had no record upon which to make a decision as of the 49th day from the filing of the appeal. Once a certified copy of the local record was forwarded to the Commission, the Commission quickly set the appeal for a hearing (40 days later).

Moreover, the applicant never raised the Commission's "failure" to set the hearing within the allotted 49 days until well after the Commission had found the appeal to raise a substantial issue. It is well settled that the Commission need not go all the way to undertaking de novo review of the application within the 49 days, and that the substantial

issue determination is enough. See, e.g., *Coronado Yacht Club v. California Coastal Com.* (1993) 13 Cal.App.4th 860.

Perhaps in order to justify its failure to raise the issue earlier, Mt. Holyoke claims that it had neither actual nor constructive notice or knowledge of the appeal proceedings (July 1999 Commission hearing), and that no hearing was actually held.

However, as stated, the Commission opened and continued the appeal on July 13, 1999. For such hearings, it is standard procedure to notify the applicant and/or applicant's representative and all appellants of the pending hearing. For this particular appeal, according to the file record, on June 17, 1999, a Notification of Appeal was mailed out requesting the City's local hearing record on this project and notifying the City; applicant, Mt Holyoke Homes, Ltd; the applicant's representative, Mr. John Bowman; and to the appellant, that submitted the appeal during the Commission twenty-day appeal period, that an appeal was received and that a hearing would be tentatively held on July 13-16, 1999. A subsequent hearing notice was mailed out on June 30, 1999 notifying the applicant's representative, appellant, and known interested parties, that a hearing would be held on July 13, 1999.

Alternative Assertion of legal error

3. Mt. Holyoke also claims that the Commission erred by failing to act on the appeal within 21 days after the conclusion of the hearing, as required by Section 30621.

Staff Analysis

Section 30622 of the Coastal Act states:

the commission shall act upon the coastal development permit application or an appeal within 21 days after the conclusion of the hearing pursuant to Section 30621.

The Commission did not conclude its hearing on this matter until its meeting on June 11, 2003, at which time the Commission did act on the appeal. Thus, the Commission acted on the appeal within the required 21 day window. Again, therefore, the Commission committed no error of law.

D. Conclusion

The applicant has not pointed to any error of fact or law that could have altered the Commission's initial decision, nor have they presented any relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter. Consequently, there is no basis for reconsideration, and the applicant's request for reconsideration must be denied.